79-5567

No. 79-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

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SUPREME COURT, U.S.

DANIEL JOSEPH BAKER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF GEORGIA

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October 1979

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia in this case.

OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at 257 S.E.2d 192 and is reproduced as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on May 31, 1979. (Appendix B.) On August 7, 1979, Mr. Justice Powell entered an order extending the time for filing this Petition by 60 days or until October 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

One of Georgia's capital punishment statutes sets forth aggravating circumstances that a jury may consider in determining whether to recommend the death penalty for a capital offense and provides that a sentence of death may not be imposed except on a finding of at least one such aggravating circumstance. One aggravating circumstance is that the offense of which the defendant was convicted "was committed while the offender was engaged in the commission of another capital felony . . . ." Ga. Code Ann. § 27-2534.1(b)(2). Another is that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim." Id. § 27-2534.1(b)(7). The questions presented are:

1. Whether, as applied to justify and sustain on appeal the imposition of the death penalty on petitioner, the catch-all aggravating circumstance, Section 27-2534.1(b)(7), is so broad and vague as to violate the Eighth and Fourteenth Amendments.

2. Whether the imposition of the death penalty violates the Eighth and Fourteenth Amendments where it is based on a finding under Section 27-2534.1(b)(7) that a murder was aggravated because it involved torture in a case in which the victim was unconscious and therefore insensible to pain at least from the time the first blow was struck.

3. Whether the imposition of the death penalty violates the Eighth and Fourteenth Amendments where it is sustained on appeal on the ground in part of a finding under Section 27-2534.1(b)(7) of "aggravated battery to the victim" that was not in fact made by the jury.

4. Whether the imposition of the death penalty based on a finding of the statutory aggravating circumstance that the

defendant committed murder while engaged in the commission of another capital felony violates the Eighth and Fourteenth Amendments where the additional felony is armed robbery, a non-capital offense.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides, in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Relevant provisions of the Georgia Code are set forth in Appendix C hereto.

STATEMENT

The jury's decision to sentence the petitioner to death following his conviction of murder was predicated on the finding of two statutory aggravating circumstances, one of which, as specified in Section 27-2534.1(b)(7) of the Georgia Code, was that the murder was "outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant." (Tr. 309.)[1/]

On October 9, 1979, this Court granted the petition for a writ of certiorari in Godfrey v. Georgia, No. 78-6899,

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1/ The statute (p. 7a, infra) speaks in the disjunctive of a murder that is "vile, horrible or inhuman," but the issue was put to the jury and it made its finding as quoted in the text, in the conjunctive.

and announced that it would review the case to decide whether the Georgia Supreme Court had adopted in that case such a broad and vague construction of Section 27-2534.1(b)(7) that imposition of a death sentence based on a finding of this aggravating circumstance would violate both the Eighth and Fourteenth Amendments. A comparable question as to the breadth and vagueness of the statute is presented by its application to the petitioner here. It is one of four substantial questions presented, all of which relate to the statutory aggravating circumstances.

The Facts

The petitioner, Daniel Joseph Baker, was indicted along with Ricky Lee Massey for the murder and armed robbery of Dennis Beatenbo. Petitioner, a youth of 19, and Massey, 16, were drinking and driving around town on the evening of May 5, 1978, when they picked up Beatenbo, who was hitchhiking. (Tr. 150.) Beatenbo, who had been drinking heavily, was wearing a shirt bearing the letters NORML -- the acronym for the National Organization for the Reform of Marijuana Laws. (Tr. 316.) Whether Beatenbo had been using drugs other than alcohol prior to meeting the defendants was not revealed by the record.

The three drove to Beatenbo's parked car, from which they obtained a bottle of liquor, and then drove around while drinking until they finally ended up on Pirkle Road in Gwinnett County, Georgia, near Norcross. Massey, the driver, began "cutting doughnuts," or making deep tire tracks, with the automobile, and Beatenbo became sick in the back seat of the car. (Tr. 150.) He was vomiting and the car was stopped to enable him to get out. (Tr. 151.) His illness was apparently attributable to his extreme level of intoxication. The

State stipulated that the ethyl alcohol content in the victim's blood was .39 percent (Tr. 107) -- almost four times the blood alcohol level of .10 percent which constitutes legal intoxication. The State's witness, Officer Phillip Whitley, the criminal investigator for the office of the District Attorney (Tr. 109), provided the following evidence on this issue:

"Q What generally is the reading that you consider drunk?

A It's .10.

Q And if somebody had .39 alcohol would that be considered very drunk?

A I think he would be unconscious.

Q He probably would be passed out would he not?

A Yes." (Tr. 159.)

The petitioner got out of the car and struck Beatenbo in the face with the liquor bottle. In the opinion of the State's medical witness, Dr. Dove, Beatenbo was thereby rendered unconscious. (Tr. 96, 103.) While Beatenbo lay unconscious on the ground, the petitioner shot him three times in the chest. Beatenbo died instantaneously, according to Dr. Dove. (Tr. 97.) After he was dead, the petitioner fired a fourth shot into his body between the legs. (Tr. 98, 100-01.) The petitioner then took the victim's wallet containing $22 and his watch. (Tr. 151-52.)

The petitioner testified during the sentencing phase of the trial that he did not kill the victim for the purpose of robbing him and did not have any intention of harming the victim prior to his sudden violent outburst. (Tr. 249, 251.) The petitioner stated that he had no explanation of why he killed Beatenbo. The petitioner testified that he took the wallet and watch after the victim was dead in order to make

the crime appear to be a robbery. (Tr. 257, 265.) The petitioner stated that he knew what he did was wrong and that he asked God to forgive him for it. (Tr. 253.)

Before The Superior Court of Gwinnett County

Petitioner was convicted of murder and armed robbery after a brief trial. Following the Georgia procedure, the same jury then sat to determine whether to recommend the death penalty. During this phase of the trial the petitioner introduced evidence that, in the words of the Georgia Supreme Court, depicted "a rather harrowing history of child abuse." (P. 2a, infra.)[2/]

The State asked for the death penalty on the basis of two aggravating circumstances specified in the Georgia statute: (1) the murder was committed while the petitioner was engaged in the commission of an additional capital felony, the armed robbery of the victim, and (2) the murder was outrageously or wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the petitioner. Petitioner moved to strike both of these statutory aggravating circumstances. Counsel argued that the first statutory aggravating circumstance must be struck because armed robbery was not a capital felony and that, accordingly, a jury recommendation of the death sentence could not constitutionally be based upon a finding that the murder was committed while the petitioner was engaged in committing an armed robbery. (Tr. 204-05.)

Petitioner moved to strike the other, catch-all, aggravating circumstance on two grounds. Petitioner argued in

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2/ Petitioner is illegitimate. (Tr. 207.) When he was 4 or 5, his mother shot and wounded herself in his presence and said she would have killed him if she had had another bullet. (Tr. 208.) In the years petitioner and his sister lived with

(footnote cont'd)

a written motion generally that the catch-all aggravating circumstance in its broad and vague phrasing "is unconstitutional and in violation of the Fourteenth Amendment of the United States Constitution." Counsel asserted also that there was no evidence of torture within the meaning of the statute. (Tr. 203-05.) He urged that, if the evidence adduced in the guilt or innocence phase of the trial were sufficient to support a finding of torture to the victim, then the death penalty would be appropriate for any murder, in violation of the teachings of Furman v. Georgia, 408 U.S. 238 (1972).

The trial court denied the motions to strike and submitted both statutory aggravating circumstances to the jury. The jury returned a recommendation of death and indicated that it found that the aggravating circumstances submitted to it were present.[3/]

Before The Georgia Supreme Court

On appeal to the Georgia Supreme Court, it was argued again that neither statutory aggravating circumstance

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(footnote cont'd)

their mother, there were beatings, mistreatment and an utter lack of affection. (Tr. 208, 237-38.) When later they lived with their father, he tried to kill them. (Tr. 209.) Relatives who briefly acted as step-parents were no better. Petitioner was made to stay in a small, unlighted, windowless room for as long as a week at a time, even after a wild animal invaded it and had to be shot to save petitioner's life. (Tr. 210-14, 239-40.) At age 8, petitioner was adopted, but his adoptive father was an alcoholic who constantly beat and otherwise mistreated petitioner and was heard by petitioner often to say that he had not wanted him adopted. (Tr. 221-22, 242-43.) After leaving the Marine Corps (which he joined as an alternative to being prosecuted on the complaint of his adoptive father in a dispute over the ownership of an automobile) petitioner met a girl, fell in love and made plans to marry. (Tr. 245-48.) That affair ended tragically. The girl was accidentally shot and killed. (Tr. 225, 248.) Petitioner took to drink and was drinking heavily at the time of the Beatenbo murder a few months later. (Tr. 225, 248-49.)

3/ So far as the aggravating circumstance involving armed robbery is concerned, the jury actually returned a writing that read: "The offense of murder was committed while the offender to incident the armed robbery of Dennis Beatenbo."

(footnote cont'd)

could constitutionally support the imposition of the death sentence. The Georgia Supreme Court sustained the petitioner's sentence of death in the face of these arguments but without seriously addressing them.

To what it characterized as an argument that the catch-all statutory "aggravating circumstance could not support imposition of the death penalty in this case, since there was no evidence of torture or an aggravated battery to the victim, and since the phrase 'depravity of mind' is unconstitutionally vague," the court responded by citing Gregg v. Georgia, 428 U.S. 153 (1976), and one of its own earlier decisions, Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933 (1977), where, it said, the argument that Section 27-2534.1(b)(7) "is unconstitutionally vague was rejected . . . ." (P. 3a, infra.)

Under the sentence review heading of its opinion, the court said that "the jury found that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated

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(footnote cont'd)

The trial court inquired:

> "THE COURT: I will ask you Mr. Foreman, did you intend to state in your writing the offense of murder was committed while the offender was engaged in the commission of an additional felony, to-wit: the armed robbery?
>
> MR. FOREMAN: Yes sir.
>
> THE COURT: I believe I am going to let you correct that so that it will include the entire language of the -- I think you intended to do so, but I believe you have omitted a sentence in it, you may do it there in your jury box if you see fit." (Tr. 309-10.)

Apparently, the jury foreman then changed the language of the jury finding to conform to the instructions of the judge. The jury was not polled to ensure that the entire panel accepted this unusual modification.

battery to the victim," and it stated a conclusion "that the evidence supports the jury's finding . . . ." (P. 3a, infra.) In fact, the question whether there was an aggravated battery of the victim was not submitted to the jury, which therefore of course made no finding that there was such a battery.[4/]

In response to the contention that it was unconstitutional to use armed robbery as "another capital felony" for purposes of the aggravating circumstance described in Section 27-2534.1(b)(2), the court said merely that it had already been decided in Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977), "that those crimes which were capital felonies in Georgia" when the code section was enacted "continue to be 'capital felonies' within the meaning" of the section. (P. 2a, infra.)

REASONS FOR GRANTING THE WRIT

I. The Georgia Supreme Court's Broad and Vague Construction of the Catch-All Statutory Aggravating Circumstance Violates the Due Process Clause and the Eighth Amendment.

In Godfrey v. Georgia, No. 78-6899, this Court has undertaken to answer the question whether the Georgia Supreme Court adopted such a broad and vague construction of Section 27-2534.1(b)(7) of the Georgia Code in sustaining the death penalty in that case that the death penalty violates the Eighth and Fourteenth Amendments. The application of Section 27-2534.1(b)(7) in this case presents an altogether comparable question of unconstitutional breadth and vagueness.

In the Godfrey case the jury's finding under Section 27-2534.1(b)(7) was merely that "the offense of murder was

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4/ The third question presented in this Petition relates to this error of the Supreme Court. Since the error occurred in that opinion, the question could not have been raised earlier. See Cole v. Arkansas, 333 U.S. 196 (1948). The constitutional claims indicated by the other three questions presented were raised and preserved as related above.

outrageously or wantonly vile, horrible and inhuman." Godfrey v. State, 243 Ga. 302, 310, 253 S.E.2d 710, 718 (1979). The "in that" clause of Section 27-2534.1(b)(7) (p. 7a, infra) was forgotten. The jury did not find that the offense involved torture or depravity of mind or an aggravated battery upon the victim, which the statute contemplates as the predicate for a conclusion that the offense was vile, horrible or inhuman and therefore deserving of the death penalty.

In this case there was no finding of an aggravated battery upon the victim, contrary to the mistaken belief of the court below. (Pp. 16-18, infra.) That possible basis of aggravation was not submitted to the jury. The jury was asked to decide whether the murder was vile, horrible and inhuman because it involved torture or depravity of mind. There was no evidence on which the jury could rationally have based a finding that the victim was tortured, as we argue below. (Pp. 14-16, infra.) But apart from that fact, the jury was allowed to find aggravation and on that basis to impose the death penalty if it found that the murder committed by petitioner involved either torture or depravity of mind. It could therefore have based its conclusion that the murder was vile, horrible and inhuman solely on a finding of depravity of mind. And the Georgia Supreme Court itself has ruled that:

> "It is unlikely that a statutory aggravating circumstance which consisted solely that the murder involved depravity of mind would survive constitutional challenge based on Furman v. Georgia, 408 U.S. 238 . . . (1972); i.e. such an aggravating circumstance could be so broad as to allow the death penalty to be imposed at random in any murder case. See Gregg v. Georgia, 428 U.S. 153 (1976) . . . ." Holton v. State, 243 Ga. 312, 318 (1979).

Thus, in this case the jury was asked to determine whether a murder merited the death penalty because it was

outrageously or wantonly vile, horrible and inhuman, terms whose breadth and vagueness raise, in the expressed judgment of this Court, a serious question whether they may constitutionally serve as guides to the exercise of jury discretion in death penalty cases;[5/] those broad and vague terms of the question put to the jury, followed as they were by an "in that" clause phrased in the disjunctive, were qualified as a matter of logical necessity only by the further epithet "depravity of mind," which the court below believes, and this Court would surely agree, is itself so broad as to invite unconstitutional random application of the death sentence. Piling four unconstitutionally vague terms on top of one another does not yield constitutional certainty.[6/]

In Gregg v. Georgia, 428 U.S. 153, 201 (1976), the Justices in the plurality acknowledged the argument that the aggravating circumstance stated in Section 27-2534.1(b)(7) is so broad and vague that it allows the death sentence to be imposed in any case. They indicated that the Georgia Supreme Court could overcome this potential constitutional infirmity through a limiting construction of this section. No such construction has been forthcoming. Quite to the contrary. The

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5/ The Court composed the precise question it will hear in Godfrey and limited the grant of certiorari to that question.

6/ We recognize that the jury found further aggravation in the circumstance that the murder was committed while the petitioner was engaged in the commission of armed robbery. We urge elsewhere that the submission of this aggravating circumstance was unconstitutional because armed robbery is not the capital felony that it was made out to the jury to be. (Pp. 19-22, infra.) In any event, however, the jury recommendation of death or life is discretionary. When the discretion is exercised in favor of death, the sentence cannot be sustained on the speculation that the discretion would have been exercised the same way had one of two essential props for the death penalty been absent.

"open-ended construction" that the plurality opinion assumed would not be adopted may be on its way to adoption. In Godfrey, the sweep of the section was widened by the court's approval of the omission of any "in that" qualifiers. All the court said on the point was that "the jury's phraseology was not objectionable." 243 Ga. at 310, 253 S.E.2d at 718. And in this case a serious challenge to the validity of the section in its application to this petitioner was met, ironically, with a citation of Gregg. (P. 3a, infra.) The irony is heightened by the fact that that citation was accompanied by a citation of Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933 (1977), where the court below revealed its total insensitivity to the constitutional concerns that should shape its construction of the seventh statutory aggravating circumstance when it noted that the terms used in this section were defined in "ordinary dictionaries, Black's Law Dictionary, or Words and Phrases." 237 Ga. at 732, 230 S.E.2d at 10. Such guides to meaning are no assistance to juries. Where, as in this case, the trial court, in its instructions to the jury, simply reads the bare language of the seventh aggravating circumstance without definition, the jury is left to grapple aimlessly with the broad and vague language of the statute. What has happened in this case, in Godfrey and in Harris bears out what Professor Charles Black said five years ago.

> "No jury need be hampered by such non-standards. The practical position remains unchanged; the Georgia jury, without real restraint and without real standards, chooses life or death." Black, Capital Punishment: The Inevitability of Caprice and Mistake 67 (1974).

The capriciousness of jury verdicts under the post-Furman Georgia statutes is demonstrable. One need only compare this case with Sanders v. State, 235 Ga. 425, 219 S.E.2d 768

(1975), cert. denied, 425 U.S. 976 (1976). There the defendant, aged 20, went to his employer's home in the early morning, raped his employer's wife, who was home alone, bound her hands and tied her feet to her neck and then killed her by shooting her in the head. The prosecution asked for death, but the jury chose life. No rule of law can explain that choice in Sanders and the opposite choice here.

Three of the Justices concurring in Gregg laid heavy emphasis on the availability under the new Georgia statutes of a special kind of appellate review of death penalty cases by the Georgia Supreme Court. 428 U.S. at 211-12, 222-25 (opinion of White, J., joined by Burger, C.J., and Rehnquist, J.); see also id. at 195 (plurality opinion). They said among other things that, "if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside." Id. at 224. Godfrey, with its cavalier observation that "the jury's phraseology was not objectionable" when the jury had in fact substantially rewritten Section 27-2534.1(b)(7), makes one doubt the quality of the Georgia Supreme Court's performance of its task. The doubt is enhanced by the lack of care manifested in this case, where the court attributed to the jury a finding as to aggravated battery on the victim that the jury was not asked to make and did not make and made other mistakes. (Pp. 16-18, infra.)

The truth is that the Georgia court does not engage in any meaningful appellate review of these jury determinations because, in the absence of a suggestion of even a source of a limiting construction more edifying than Black's Law Dictionary or Words and Phrases, meaningful appellate review is not possible. The Georgia Supreme Court has given itself no basis

on which to judge when a jury finding of the seventh statutory aggravating circumstance is erroneous, thereby eliminating any opportunity for a defendant effectively to argue that his case did not fall within the statute.

II. The Complete Absence of Evidence That The Petitioner Tortured the Victim Renders the Finding of the Catch-All Statutory Aggravating Circumstance a Violation of the Eighth and Fourteenth Amendments.

Torture, which implies the existence of extreme physical pain, can occur only if the victim is both alive and conscious when the offending conduct occurs. Before any action had been taken by the petitioner against the victim, Beatenbo, the latter was virtually unconscious as a result of his ingestion of alcohol and possibly other drugs as well. While legal intoxication occurs at a blood alcohol content level of .10 percent, it was stipulated by the State that the alcohol content in the blood of the victim was .39 percent. (Tr. 107). At this level of intoxication, the victim was virtually unconscious before he was ever struck by the petitioner, as Officer Whitley testified. (Tr. 159.) The body's decreased sensitivity to pain as a result of the ingestion of quantities of alcohol far below that evidenced by the victim in this case is well known, as illustrated by the frequent description of an intoxicated person's state as that of "feeling no pain."

The testimony of the State Medical Examiner indicated that, when the petitioner struck the victim in the face with a liquor bottle, the victim was instantly knocked unconscious. (Tr. 103.) Of course, once the victim was unconscious any further action by the petitioner could not possibly have constituted torture because a necessary condition for the existence of torture is the victim's ability to feel pain.

The petitioner then shot the unconscious victim in the chest, killing him instantly. There is certainly not a shred of evidence that would suggest that the victim suffered the prolonged agony that is the sine qua non of torture.[7/]

On any rational view of what is comprehended within the term "torture," there was no evidence of torture and the finding of aggravation of the murder based on torture falls afoul of the rule of Thompson v. Louisville, 362 U.S. 199 (1960), and the cases that have followed it in condemning as a deprivation of liberty (or, as in this case, life) without due process of law the imposition of criminal sanctions without the support of evidence. See Garner v. Louisiana, 368 U.S. 157 (1961); Johnson v. Florida, 391 U.S. 596 (1968); Vachon v. New Hampshire, 414 U.S. 478 (1974).

The State may urge that, effectively if not explicitly, its highest tribunal has construed "torture" to include the conduct engaged in by the petitioner. Such a broad construction of the word "torture," however, would carry its own fatal constitutional flaw. It would necessarily enable a jury to return the death penalty in very nearly any murder case on the ground that the killing involved torture. Such a construction would therefore invest the jury with complete discretion over the determination whether a human life should be taken or

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7/ The prosecutor revealed his ignorance of the concept "torture" in his closing argument when he alluded to petitioner's shooting the victim "in the privates" and commented: "If that ain't torture then I don't understand the word torture." (Tr. 276.) While the prosecutor tried to inflame the passions and prejudices of the jury by referring to the shot between the legs of the already dead victim as being torturous, it is clear that a dead body does not feel pain. Even the prosecutor conceded this elementary proposition when, in speaking to the jury of the shot between the victim's legs, he stated "Sure, he didn't feel it." (Tr. 274.)

spared, thus posing an inordinately high risk that wholly arbitrary and capricious action would ensue, in violation of the Eighth Amendment. Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153, 189 (1976).

We do not know what is in fact the view of the Georgia Supreme Court because it substantially ignored petitioner's argument that there was no evidence of torture adduced at trial. It merely stated the bare, unhelpful conclusion that the evidence supported the jury's finding that "the offense of murder . . . involved torture, depravity of mind, or an aggravated battery." (P. 3a, infra; emphasis supplied.) One is left to guess which of the three the court thought was supported by evidence -- including perhaps the underscored circumstance, which was not the subject of the jury's finding.

III. The Georgia Supreme Court Failed to Appraise the Validity of the Petitioner's Death Sentence as it was Determined in the Trial Court in Violation of Petitioner's Rights Under Both the Eighth and Fourteenth Amendments.

We have already indicated the substance of the considerations relevant to the third question presented in preceding sections of the Petition. The carelessness of the Georgia Supreme Court in reviewing this death penalty case underlines the seriousness of the questions whether an unconstitutional standardless sentencing system has grown up in Georgia and whether the court that bears such a heavy responsibility for the operation of the sentencing system overlooks such elementary constitutional requirements as the requirement that there be evidence in support of a charge.

Independently, however, the most significant manifestation of appellate carelessness in this case -- the attribution on appeal to a death sentence jury of a finding in aggravation that it never made and the affirmance of a death penalty on

the basis in part of that misattribution -- itself poses a substantial question that calls for review by this Court.

As we have said, the court below professed to inquire into whether the jury's finding of two statutory aggravating circumstances was supported by the evidence. In doing so, it said:

> "[T]he jury found that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Code Ann. § 27-2534.1(b)(7)." (P. 3a, infra.) (emphasis supplied)

The court was mistaken. The jury found only that "the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant." (Tr. 309.) The jury was not asked to find and did not find that "an aggravated battery to the victim" occurred; in addition, its conclusion that the murder was vile, horrible and inhuman on account of the presence of torture or depravity of mind was in the conjunctive and not, as the court had it, in the disjunctive. The court seemingly read the statute but not the record.[8/]

As the plurality Justices said in the first review of Georgia's post-Furman death penalty statutes:

> "Where the sentencing authority is required to specify factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that

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8/ The court made one further mistake that may have been attributable to reading the statute and not the record findings of aggravation, which did not precisely track the statute. The court said that the jury found that the murder "was committed while the defendant was engaged in the commission of another capital felony, to wit, armed robbery." (P. 3a, infra.) In fact, to the extent that the jury made any intelligible finding at all on this point, its finding did not use the adjective "capital" in describing the felony of armed robbery. (Note 3, supra.)

> death sentences are not imposed capriciously or in a freakish manner." Gregg v. Georgia, 428 U.S. 153, 195 (1976).

Clearly, the Georgia Supreme Court has denied petitioner the meaningful appellate review spoken of in Gregg by disregarding the articulated basis of the jury's decision. It thus calls into question the consistency of its decision with the Eighth Amendment proscription of cruel and unusual punishment.

Moreover, by affirming the jury's finding of a statutory aggravating circumstance on the basis of a statutory provision that was neither presented to nor found by the jury, the Georgia Supreme Court denied petitioner the due process of law that he is guaranteed by the Fourteenth Amendment. The simple lesson of Cole v. Arkansas, 333 U.S. 196 (1948), is that due process is denied when a person is charged with, tried for and convicted of crime A and on appeal the conviction is affirmed on the ground that the evidence shows that he committed crime B. The Court said:

> "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.
>
> "We are constrained to hold that the petitioners have been denied safeguards guaranteed by due process of law --safeguards essential to liberty in a government dedicated to justice under law." 333 U.S. at 202.

In this case, petitioner's guilt of aggravated murder -- and that is what the jury verdict in the sentencing phase amounts to -- was affirmed on a ground other than that on which petitioner was tried and convicted, in violation of the rule of Cole v. Arkansas.

IV. The Georgia Supreme Court's Determination That Petitioner Committed the Crime of Murder While He "Was Engaged in the Commission of Another Capital Felony" Violates Both the Eighth and Fourteenth Amendments Because Armed Robbery Is Not a "Capital Felony".

Section 27-2534.1(b)(2) of the Georgia Code establishes the following statutory aggravating circumstance:

> "The offense of murder . . . was committed while the offender was engaged in the commission of another capital felony . . . ."

The Supreme Court of Georgia held that this statutory aggravating circumstance applied in this case because the petitioner committed a murder while engaged in the commission of an armed robbery.

A capital felony by definition is a crime for which one can receive a sentence of death.[9/] While the Georgia legislature attempted to make armed robbery a capital felony when it enacted its death penalty statutes,[10/] this attempt proved unsuccessful when the courts declared that one could not constitutionally receive a sentence of death for the commission of a mere armed robbery. Coker v. Georgia, 433 U.S. 584 (1977); Collins v. State, 239 Ga. 400, 236 S.E.2d

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9/ See Ga. Code Ann. § 26-3102, which defines a capital offense as "an offense which may be punishable by death." (P. 6a, infra.) The definition of a "capital felony" has been settled in Georgia, if not everywhere, for decades:

> "Felonies, in the Penal Code, are thus divided into two classes -- capital felonies, and felonies not capital. If under any circumstances the penalty of death can be inflicted, the offense is capital, whether it is actually inflicted in a particular case or not. If under no circumstances the death penalty can be inflicted, the offense is not capital." Caesar v. State, 127 Ga. 710, 712-13, 57 S.E. 66, 67 (1907).

10/ Ga. Code Ann. § 26-1902.

759 (1977).[11] Accordingly, armed robbery is not a capital felony in the State of Georgia.

As was said in the plurality opinion in Gregg v. Georgia, 428 U.S. 153, 164-65 (1976):

> "Before a convicted defendant may be sentenced to death [under the Georgia death penalty statute], the jury . . . must find beyond a reasonable doubt one of the 10 aggravating circumstances specified in the statute."

It is axiomatic that the jury must find every element of the offense beyond a reasonable doubt before any criminal sanction can be constitutionally imposed. In re Winship, 397 U.S. 358 (1970). It follows, a fortiori, that in Georgia a jury must find every element of at least one aggravating circumstance beyond a reasonable doubt before a defendant can be sentenced to death. Mullaney v. Wilbur, 421 U.S. 684 (1975). Therefore, the petitioner's death sentence cannot rest upon the additional capital felony statutory aggravating circumstance. One element of the offense could not be proved beyond a reasonable doubt because even if an armed robbery were proved conclusively it would not amount to the statutory offense of an "additional capital felony."

The Georgia Supreme Court appeared to comprehend this point in Collins v. State, 239 Ga. 400, 236 S.E.2d 759 (1977). The question there was whether, after Coker, the court had direct appellate jurisdiction of convictions of

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11/ Although the narrow holding of Coker v. Georgia, 433 U.S. 584 (1977), was that the Eighth Amendment prohibits the imposition of the death penalty for rape of an adult woman where the victim is not killed, the Supreme Court of Georgia has properly recognized that "the rationale of Coker must be applied also to armed robbery and kidnapping." Collins v. Georgia, 239 Ga. 400, 404, 236 S.E.2d 759, 761 (1977).

rape, kidnapping, and armed robbery under the Georgia constitutional provision conferring jurisdiction on it "in all cases of conviction of a capital felony." The court, after first noting that the death penalty could not be imposed for those crimes, said:

> "It follows that there can be no conviction of a capital felony for these crimes within the meaning of the constitutional provision establishing the jurisdiction of the Supreme Court." 239 Ga. at 402, 236 S.E.2d at 761.

The court has nevertheless taken the view and reiterated it in this case that for purposes of the death penalty statutes the term "capital felony" includes those felonies, such as armed robbery, that the statutes as originally enacted specified as being subject to punishment by death. Peek v. State, 239 Ga. 422, 432, 238 S.E.2d 12, 20 (1977). The Supreme Court of Georgia has reasoned that the simple fact that armed robbery is not a capital felony should not prevent it from holding that armed robbery is a capital felony for purposes of aggravation. This Lewis Carroll approach to the construction of the state's criminal code exceeds the limits that the due process clause places on the power of the states to give artificial content to the commonplace words in which criminal codes are expressed. Compare Garner v. Louisiana, 368 U.S. 157 (1961); Johnson v. Florida, 391 U.S. 596 (1968).[12]

The branding of armed robbery as something it is not violates the petitioner's due process rights for an additional

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12/ It is significant that the transgression of the due process limits is laid to a court and not the legislature. Particular deference is owed to a legislative "specification of punishments," Gregg v. Georgia, 428 U.S. 153, 176 (1976), but here it is a court, to which no such deference is owed, that has distorted the meaning of the words chosen by the legislature to make them result in an aggravation of punishment in a case that on their face they do not reach. In Georgia, as in the federal system, "defining crimes and fixing penalties are legislative, not judicial, functions." United States v. Evans, 333 U.S. 483, 486 (1948).

reason. The jury may have been led to believe incorrectly that, if petitioner had committed an armed robbery, he had committed a crime for which he could be punished by death.[13/] A jury's belief that a defendant has committed two crimes for which he could be sentenced to death -- two capital felonies -- enhances the possibility that such a defendant will receive the death sentence for the single capital felony with which he is charged. If a jury's sentencing deliberations are based on the erroneous view that a defendant has committed two capital felonies, the defendant is denied a fair sentencing trial.

CONCLUSION

The writ of certiorari should be granted to review the judgment of the Georgia Supreme Court. Upon grant of the writ, this case should be set to be heard with Godfrey v. Georgia, No. 78-6899. Alternatively, the Court may wish to hold this case on its calendar pending judgment in the Godfrey case.

Respectfully submitted,

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Attorneys for Petitioner

October 1979

13/ The adjective "capital" was omitted from the formal charge to the jury and therefore its finding, although the Georgia Supreme Court was apparently unaware of that fact. (Notes 3, 8, supra.) The jury was made aware by the arguments of counsel that the statute spoke of another "capital felony" and that it was to apply the statute in determining aggravation. (Tr. 269, 284.) In addition, it appears that the prosecutor's notice of the aggravating circumstances he relied on, which spoke of the armed robbery as "an additional capital felony," was with the jury during its deliberations. (Tr. 307.)

192 Ga 257 SOUTH EASTERN REPORTER, 2d SERIES

BAKER
v.
The STATE.
No. 34588.
Supreme Court of Georgia.
Argued March 13, 1979.
Decided May 31, 1979.

Defendant was convicted in the Gwinnett Superior Court, Pittard, J., of murder and armed robbery. His case came before the Supreme Court on direct appeal and for mandatory review of the death sentence imposed. The Supreme Court, Marshall, J., held that: (1) those crimes which were capital felonies in the State when death penalty statute was enacted, including armed robbery, continue to be "capital felonies" within meaning of that statute; (2) evidence establishing that homicide victim had been hit with bottle in the face, that three bullets were fired into his chest at point-blank range and that fourth was fired between his legs after he had died supported jury's finding of statutory aggravating circumstances, i. e., that offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to victim; and (3) the death sentence was not excessive or disproportionate to the penalty imposed upon defendant's accomplice, or to the penalty imposed in other cases.

Affirmed.

1. Criminal Law ⇐1208(6)
Robbery ⇐30
Those crimes which were capital felonies in the State when death penalty statute was enacted, including armed robbery, continue to be "capital felonies" within meaning of that statute. Code, § 27-2534.1(b)(2).
See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law ⇐1208(1)
Statute authorizing imposition of death penalty where offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to victim is not unconstitutionally vague. Code, § 27-2534.1(b)(7).

3. Homicide ⇐354
Evidence establishing that homicide victim had been hit with bottle in face, that three bullets were fired into his chest at point-blank range and that fourth was fired between his legs after he had died supported jury's finding of statutory aggravating circumstances, i. e., that offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to victim. Code, § 27-2534.1(b)(2, 7).

4. Homicide ⇐354
In view of fact that defendant was actual perpetrator of murder and armed robbery, of fact that State did not seek death penalty in co-defendant's case and of fact that co-defendant was more youthful offender that defendant, defendant's sentence to death was not excessive or disproportionate to penalty imposed upon his accomplice, nor was defendant's death sentence excessive or disproportionate to penalty imposed in similar cases considering both crime and defendant. Code, § 27-2534.1(b)(2, 7).

Wynn Pelham, Lawrenceville, for appellant.

Bryant Huff, Dist. Atty., Arthur K. Bolton, Atty. Gen., Nicholas G. Ivanich, Sp. Asst. Atty. Gen., for appellee.

MARSHALL, Justice.

The appellant was convicted of murder and armed robbery. He received a death

sentence for the murder conviction and a sentence of life imprisonment for the armed robbery conviction. His case is here on direct appeal and for mandatory review of the death sentence imposed.

I. Summary of the Evidence

The evidence authorized the jury in finding the following:

On the evening of May 5, 1978, the victim, Dennis Beatenbo, was drinking at a Holiday Inn adjacent to Interstate 85 in Norcross, Georgia. On this same evening, the appellant and Ricky Massey were drinking and driving in the Norcross-Doraville area. At approximately midnight, the victim left the Holiday Inn to go to his car, which was parked nearby at his place of employment. The appellant and Massey passed Beatenbo en route to his car, and they stopped and offered him a ride. In exchange for the ride, Beatenbo offered the appellant and Massey some liquor which he had in his car. In a confession later given by the appellant to police, he stated that when Beatenbo got out of the car to get the liquor, Massey suggested that they "roll him." The three men began riding around together and drinking, and they drove to an isolated spot near a lake. Beatenbo began to get sick and Massey opened the car door so Beatenbo could get out.

In his confession to police, the appellant stated that as Beatenbo was lying on the back seat with his head hanging down, the appellant hit him over the head with a liquor bottle; that Beatenbo fell out of the car; and that the appellant then took his watch and wallet. As stated by the appellant, "I reached in my belt with my right hand and pulled out my pistol and the guy was still laying [sic] on his back. I pointed the gun at the man and I pulled the trigger. I don't know how many times I shot him, but I could hear him moaning and trying to say something."

Medical testimony established the cause of death as a gunshot wound to the chest. It was also established that the victim had been hit with the bottle in the face, rather than on the back of his head, and that the victim received a total of four gunshot wounds. Three of the gunshot wounds were fired into the victim's chest at point-blank range, and the fourth gunshot was fired between his legs after he had died. The bullets recovered from the victim's body were shown to have been fired from the appellant's gun.

In mitigation, the appellant introduced evidence depicting a rather harrowing history of child abuse.

II. Enumerations of Error.

There are two enumerations of error in this appeal.

[1] 1. First, the appellant argues that the death penalty can no longer be imposed under Code Ann. § 27-2534.1(b)(2) (Ga.L. 1973, pp. 159, 163) on the ground that the murder was committed while the offender was engaged in the commission of another capital felony, to wit, armed robbery, since armed robbery is no longer a capital felony. *Collins v. State*, 239 Ga. 499, 238 S.E.2d 359 (1977); *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974).

It has already been decided in *Peek v. State*, 239 Ga. 422, 431, 432, 238 S.E.2d 12 (1977) that those crimes which were capital felonies in Georgia at the time Code Ann. § 27-2534.1(b)(2) was enacted, including armed robbery, continue to be "capital felonies" within the meaning of the statute. This enumeration of error is therefore without merit.

2. In the second enumeration of error, the appellant argues that the trial court erred in overruling his motion to strike the statutory aggravating circumstance found at Code Ann. § 27-2534.1(b)(7), which authorizes imposition of the death penalty where "[t]he offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, a depravity of mind, or an aggravated battery to the victim."

[2] The appellant argues that this statutory aggravating circumstance could not support imposition of the death penalty in this case, since there was no evidence of

torture or an aggravated battery to the victim, and since the phrase "depravity of mind" is unconstitutionally vague. The argument that Code Ann. § 27-2534.1(b)(7) is unconstitutionally vague was rejected by the Supreme Court of the United States in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) and by this court in *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976) (cert. den., 430 U.S. 933, 97 S.Ct. 2542, 53 L.Ed.2d 251 (1977)).

Whether the evidence supports imposition of the death penalty under these two statutory aggravating circumstances, which were found by the jury, will be addressed in the sentence review, infra.

III. Sentence Review.

1. Was the sentence of death imposed under the influence of passion, prejudice, or any other arbitrary factor? We conclude that it was not.

[3] 2. Does the evidence support the jury's finding of statutory aggravating circumstances?

In this case, the jury found that the offense of murder was committed while the defendant was engaged in the commission of another capital felony, to wit, armed robbery. Code Ann. § 27-2534.1(b)(2). In addition, the jury found that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Code Ann. § 27-2534.1(b)(7).

We conclude that the evidence supports the jury's finding of these statutory aggravating circumstances.

[4] 3. Is the sentence of death excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant?

The appellant's accomplice, Ricky Massey, was also tried for murder and armed robbery; and Massey was sentenced to life imprisonment. *See Massey v. State*, 243 Ga. 228, 253 S.E.2d 166. The initial question presenting itself is whether the appellant's death sentence is disproportionate to the penalty imposed in Massey's case. We find relevant distinctions between Massey's case and Baker's case, which warrant imposing the severer sanction in this case and not in Massey's. First, it is undisputed that the appellant was the actual perpetrator of the murder and armed robbery; whereas, the proof of Massey's participation in the murder and armed robbery is not so unequivocal. Second, the state did not seek the death penalty in Massey's case. Third, Massey is a more youthful offender than the appellant. Massey was 16 years of age at the time the crimes were committed.

In sum, we find that the appellant's sentence to death is not excessive or disproportionate to the penalty imposed in the case of his accomplice, Ricky Massey. In determining whether the appellant's death sentence is excessive or disproportionate to the penalty imposed in other similar cases, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder, and we find that those similar cases set forth in the appendix support affirmance of the death penalty. Daniel Baker's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant; the verdict is factually supported.

We have reviewed the instructions given by the trial judge during the sentencing phase and find that they are not subject to the defects dealt with in our decisions in *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977) and *Hawes v. State*, 240 Ga. 327(9), 240 S.E.2d 833 (1977).

Judgment affirmed.

All the Justices concur.

APPENDIX

Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974); *Floyd v. State*, 233 Ga. 780, 210 S.E.2d 810 (1974); *Moore v. State*, 233 Ga. 861, 213 S.E.2d 850 (1974); *Mitchell v. State*, 234 Ga. 109, 214 S.E.2d 900 (1975); *Berryhill v. State*, 235 Ga. 569, 221 S.E.2d 185 (1976); *Smith v. State*, 236 Ga. 12, 222

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S.E.2d 308 (1976); *Dobbs v. State*, 236 Ga. 427, 224 S.E.2d 3 (1976); *Pulliam v. State*, 236 Ga. 460, 224 S.E.2d 8 (1976); *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248 (1976); *Young v. State*, 237 Ga. 852, 230 S.E.2d 287 (1976); *Douthit v. State*, 239 Ga. 81, 235 S.E.2d 493 (1977); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977); *Stanley v. State*, 240 Ga. 341, 241 S.E.2d 173 (1977); *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1977); *Thomas v. State*, 240 Ga. 393, 242 S.E.2d 1 (1977); *Alderman v. State*, 241 Ga. 496, 246 S.E.2d 642 (1978); *Redd v. State*, 242 Ga. 876, 252 S.E.2d 383 (1979).

34588 SUPREME COURT OF GEORGIA APPENDIX B

ATLANTA, May 31, 1979

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

DANIEL JOSEPH BAKER V. THE STATE

This case came before this court upon an appeal from the Superior Court of GWINNETT County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

~~BILL OF COSTS, $30.00~~

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, ~~and that paid the above bill of costs~~.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk

APPENDIX C

This case involves the following provisions of the Georgia Code:

Ga. Code Ann. § 26-3102

"Capital offenses; jury verdict and sentence.

Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. § 27-2534.1

"Mitigating and aggravating circumstances; death penalty.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed

while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in change and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond

a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in Code Section 27-2534.1(b) is so found, the death penalty shall not be imposed."

Ga. Code Ann. § 27-2537

"Review of death sentences.

(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The Court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

JAN 4 PAGE 15

Supreme Court, U.S.
FILED
DEC 19 1979
MICHAEL RODAK, JR., CLERK

NO. 79-5567

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

DANIEL JOSEPH BAKER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

REPLY BRIEF FOR PETITIONER

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December 1979

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5567

DANIEL JOSEPH BAKER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

REPLY BRIEF FOR PETITIONER

I.

The petitioner has argued that the failure of the Georgia Supreme Court to limit by its construction the broad and vague terms of Georgia's catch-all statutory aggravating circumstance violates his Eighth and Fourteenth Amendment rights. The State addresses this argument by citing Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933 (1977), in which the Georgia Supreme Court stated "its intention to restrict its approval of death sentences supported by Code § 27-2534.1(b)(7) to those cases which lie not on the periphery of the statutory boundaries,

but to only approve those sentences which are so outrageous and vile so as to lie at the core of the statutory intent." (Br. in Opp. 8.) The accuracy of the court's self-serving statement is questionable. The Georgia Supreme Court has never reversed a jury finding of the catch-all aggravating circumstance. More fundamentally, though, this assertion does not adequately address the problem of the broad and vague statutory language of the catch-all aggravating circumstance. This Court has emphatically stated that the discretion of the jury must be limited if a statutory death penalty scheme is to comport with the requirements of the Constitution. Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153, 189-195 (1976). A broad and vague statute that affords a jury complete freedom to choose life or death is clearly not salvaged by appellate review that throws out "peripheral cases." Such review does not cure the failure of the statute to provide in the first instance useful guidance for the jury.

II.

Petitioner has referred to the similarities between the instant case and Godfrey v. Georgia, 243 Ga. 302, 253 S.E.2d 710 (1979), cert. granted, No. 78-6899 (Oct. 9, 1979). The State asserts that there is a "clear distinction" between these two cases because in Godfrey the Georgia Supreme Court affirmed a death sentence on the basis of an incomplete jury finding, while in the case sub judice, the Georgia Supreme Court affirmed in part on a finding the jury never made. While

the precise errors made by the Georgia Supreme Court in these two cases are not identical, they do reveal the court's failure to exercise even the slightest care in ensuring that the facts justify a jury's findings and that the findings legally permit the imposition of the death sentence under the applicable statutory language.

III.

The State claims that the disjunctive phraseology of the Georgia Supreme Court's opinion in the instant case somehow eliminates the court's error of affirming a death sentence on the basis in part of a finding that was never made by the jury, i.e., that the offense involved an aggravated battery to the victim. The Georgia Supreme Court affirmed the finding of the catch-all aggravating circumstance in these words:

> "In addition, the jury found that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Code Ann. § 27-2534.1(b)(7)
>
> We conclude that the evidence supports the jury's finding of these statutory aggravating circumstances." (Pet. 3a) (emphasis added)

After quoting this language, which seems on its face to demonstrate that the court did just what petitioner says it did, the State says: "By citing the above, the Georgia Supreme Court simply held the jury's finding fell within the above language." (Br. in Opp. 10.) That is precisely the error of which the petitioner complains. The fact that the finding was in the disjunctive of course establishes the error of the Georgia Supreme Court rather than justifies it. In essence, the State contends that, when the Georgia Supreme Court is

asked to affirm a jury finding of Proposition A, it may do so by stating that it believes that the evidence supports a finding of A or B, even if the jury has never heard of Proposition B and consequently could never have found it. The State says: "Thus, the Georgia Supreme Court's reference to aggravated battery [Proposition B] in its opinion simply has no bearing on whether the Petitioner's death penalty is authorized when ample evidence supports the finding of all other aggravating circumstances [Proposition A]." (Id. at 10-11.)

It is impossible to determine from the Georgia Supreme Court's opinion that its conclusion that the evidence supports the jury's finding of the catch-all statutory aggravating circumstance was not based on the Georgia Supreme Court's view that an aggravated battery to the victim had occurred. Accordingly, the petitioner's death sentence is being affirmed on the basis of a charge that was not made and a fact that was not found by the jury. Cole v. Arkansas, 333 U.S. 196 (1948), and its progeny clearly establish that such an affirmance constitutes a flagrant violation of a defendant's right to due process of law.

IV.

Petitioner argues that the imposition of the death penalty in his case violates the Eighth and Fourteenth Amendment because it is based on a finding that the murder involved torture when the evidence revealed that the victim was unconscious and therefore insensible to pain at least from the time the first blow was struck. The State answers this argument by

stating that, because the victim "was severely struck in the head and shot four times by the Petitioner, this Court should reject the Petitioner's argument that there was no evidence of torture," citing Last Term's decision in Jackson v. Virginia, No. 78-5283, (June 28, 1979). (Br. in Opp. 12.)

First, while the State acknowledges on the very same page of its brief that the State's medical witness, Dr. Dove, provided uncontradicted testimony that the fourth shot was fired after the victim was dead, it continues to argue that this post-mortem shot is evidence of torture. Repetition does not cure the illogic of this position. (See Pet. 14-15.) Second, the State's reference to the severity of the first blow further undermines its position, for Dr. Dove stated his belief that the blow rendered the victim unconscious.

Finally, the State's citation of Jackson v. Virginia provides forceful support for the petitioner's argument that his death sentence is unconstitutional. Jackson held that a conviction violates the Fourteenth Amendment "if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Slip op. at 16. The evidence adduced at trial from the State's own medical witness, Dr. Dove, and from State's witness Officer Phillip Whitley of the District Attorney's office was that the victim was extremely intoxicated at the time of the attack to such an extent that he was virtually unconscious (Tr. 159), that the initial blow would have rendered him unconscious in any event (Tr. 96, 103),[1/] and that the unconscious victim was shot three times in the chest

---

1/ Even the prosecutor, in questioning the defendant, elicited the information that the initial blow rendered the victim unconscious:

"Q: Now, when you hit him with the bottle you knocked him out didn't you, he was laying on the ground?
A: I believe so, yes, sir." (Tr. 261.)

and died instantaneously (Tr. 97). Against this impressive array of evidence, respondent offers a single statement from the confused[2/] and inaccurate[3/] statement that police officers made from discussions with the petitioner. While this evidence is technically relevant, it certainly could not constitutionally support a conviction, for as this Court stated in Jackson:

> "Any evidence that is relevant -- that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, cf. Fed. Rule Evid. 401 -- could be deemed a "mere modicum." But it could not seriously be argued that such a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt." Slip op. at 12.

V.

Petitioner has argued that the Georgia Supreme Court's determination that the crime of murder was committed while he "was engaged in the commission of another capital felony" violates the Eighth and Fourteenth Amendments because armed robbery is not a "capital felony." The State's answer to this argument is that Georgia has construed the term "capital felony" in § 27-2534.1(b)(2) to include certain non-capital felonies such as armed robbery. Of course, this response does not address the petitioner's argument. The petitioner has never questioned that Georgia has adopted this construction; petitioner's argument is that this construction is constitutionally impermissible because it prejudices criminal defendants by inaccurately and unfairly exaggerating the severity of the alleged criminal conduct. The State offers no answer to this constitutional argument and petitioner asserts that, indeed, none exists.

2/ The "statement" of Daniel Baker was written down in longhand by Detective Jack Burnett during a lengthy interrogation of the defendant. (Tr. 122.) One reflection of the confusing nature of this statement is provided by the mistatement of the facts in the State's brief. Thus, while the State says that petitioner put the gun in his belt prior to hitting the victim (Br. in Opp. 2), the statement indicates that petitioner put the gun in his belt after he struck the victim causing him to fall out of the car. (Tr. 151.) The non-sequential order of the statement probably explains the State's error, and it may also explain the other apparent inconsistencies between the statement and the medical evidence concerning the consciousness of the victim.

3/ The "statement" indicates that the victim was struck in the back of the head. (Tr. 151.) In fact, the victim was struck in the face. (Tr. 102.)

CONCLUSION

For the reasons stated in the petition, which as indicated by this reply are not diminished by the brief in opposition, petitioner submits that the writ of certiorari should be granted to review the judgment of the Georgia Supreme Court.

Respectfully submitted,

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December 1979

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5567

DANIEL JOSEPH BAKER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

CERTIFICATE OF SERVICE

I, William H. Allen, a member of the Bar of this Court and one of the attorneys for the petitioner in this case, hereby certify that I have this 19th day of December, 1979, served the accompanying reply brief to the Supreme Court of the State of Georgia by causing copies thereof to be mailed, properly addressed and with first-class postage prepaid, to the Honorable Arthur K. Bolton, Attorney General of Georgia, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334, and to the Honorable Bryant Huff, District Attorney, Gwinnett Judicial Circuit, P. O. Box 568, 142 Pike Street, Lawrenceville, Georgia 30246.

William H. Allen

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

The State of Georgia, by and through the Attorney General of the State of Georgia, respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the Georgia Supreme Court's decision in this case. That opinion is reported 243 Ga. 710, 257 S.E.2d 192 (May 31, 1979), and is attached to the petition as Appendix A.

PART I

QUESTIONS PRESENTED

1.

Whether under the facts of this case, the Georgia Supreme Court properly reviewed and affirmed the jury's finding that Petitioner's death penalty was supported by aggravating circumstances listed under Ga. Code Ann.§§ 27-2534.1(b)(2) and (b)(7)?

2.

Whether armed robbery may still be considered a capital felony for purposes of Ga. Code Ann. § 27-2534.1(b)(2), which authorizes the imposition of the death penalty when the jury finds that a murder has been committed in the course of another capital felony, when the death penalty may no longer be imposed in Georgia for the crime of armed robbery?

PART TWO

STATEMENT OF THE CASE

Petitioner seeks to have this Court review the decision of the Georgia Supreme Court in Baker v. State, 243 Ga. 710, 257 S.E.2d 192 (May 31, 1979), in which the Petitioner's conviction and death sentence for murder were upheld. The Petitioner was convicted in Gwinnett County, Georgia in November, 1978. A summary of the evidence adduced at Petitioner's trial is contained in the Georgia Supreme Court's opinion. (Id. 243 Ga. at p. 710-711; Petitioner's Appendix A, p. 2a).

A somewhat more detailed statement of facts is as follows: On the evening of May 5, 1978, Dennis Beatenbo and two of his friends had stopped at a Holiday Inn in Norcross, Georgia for drinks. At approximately 12:00 a.m. Dennis left his friends to retrieve his automobile which had been parked at another location. (T. 68-69, 75-76).[1/] On that same evening the Petitioner and Rick Massey had been drinking and also driving around the Norcross community in Massey's automobile. Seeing Dennis Beatenbo walking to his car, Massey and the Petitioner asked him if he needed a ride. (T. 149-150). In exchange for the ride Dennis Beatenbo offered the Petitioner and Massey some liquor which was contained in a bottle on the front seat of his automobile. (T. 70, 150, 261). In a statement to the police the Petitioner related that when Beatenbo left Massey's car to retrieve the liquor, Massey suggested that they "roll" him. (T. 150). The three men rode around the area, stopped to get a coke to mix with the liquor and later drove up to an isolated spot near a lake. (T. 150). Thereafter, Dennis Beatenbo began to feel nauseated so Massey opened the back

1/References in this brief to the pagination of the official transcript are indicated by T. ____; references to the official record are indicated by R. _____.

door so that Dennis could get out of the car. (T. 151). The Petitioner then placed a newly purchased .25 caliber pistol in his belt, and walked towards the back of the car near Dennis Beatenbo. (T. 151).

In his confession to the police the Petitioner related the following events. Dennis Beatenbo was lying on the back seat with his head hanging over. The Petitioner then smashed Beatenbo in the head with the liquor bottle, causing the bottle to break. Beatenbo raised up and fell out of the other side of the car, lying with his back on the ground. (T. 151, 251). The Petitioner then took the victim's wallet and watch while Massey observed. (T. 151). In Petitioner's own words, "I reached in my belt with my right hand and pulled out my pistol and the guy was still lying on his back. I pointed the gun at the man and pulled the trigger, I don't know how many times I shot him, but I could hear him moaning and trying to say something." (T. 151). The Petitioner and Massey then left the scene and drove to a trailer where the Petitioner stayed. On the way there Petitioner gave Massey eleven dollars of the twenty-two dollars found in the victim's wallet. He then threw the wallet in the woods. (T. 152).

The Norcross Police discovered the victim's body the next morning. (T. 78). Doctor Donald Dove, State Medical Examiner, testified that the victim had suffered a crushing blow to his face which broke his nose and damaged his eye and facial tissues. (T. 102). Doctor Dove further testified that the victim had received four deliberate gunshot wounds, three of which were the result of the pistol being pressed firmly against his body and fired into his chest. One bullet was also fired in the victim's scrotum area. (T. 97, 101-102). Doctor Dove stated his belief that the fourth shot was fired after the victim had died. (T. 101).

Witness Bobby Barnes testified that on Friday, May 5, 1978, the Petitioner said to him that he had killed a man by hitting him in the face with a bottle and then shooting him. (T. 82). Barnes also testified that he had seen the Petitioner with a gun at the Petitioner's trailer, and that the Petitioner told him he had taken twenty-two dollars from the victim's wallet. (T.83-84).

After the Petitioner's arrest, he informed the police where to find the pistol which was used in the murder, and Massey led the police to Dennis Beatenbo's watch which had been thrown away. (T. 132, 162). During the course of the Petitioner's questioning by police, he stated that Massey had never suggested killing Dennis Beatenbo, but suggested only that they "roll" him. (T. 158). When Detective Jack Burnette questioned the Petitioner as to why he had killed the victim, Baker answered "Just to watch him die." (T. 168).

Petitioner was convicted of murder, and following the punishment phase of the trial, the jury found that the imposition of the death penalty was justified based on the following aggravating circumstances: (1) the murder was committed while the Petitioner was engaged in the armed robbery of the victim; and (2) the murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of the mind on the part of the Petitioner. (R. 12).

PART III

REASONS FOR NOT GRANTING THE WRIT

A. THE GEORGIA SUPREME COURT PROPERLY PERFORMED ITS REQUIRED DUTY TO REVIEW ALL DEATH PENALTIES IMPOSED UNDER THE GEORGIA CAPITAL PUNISHMENT STATUTORY SCHEME, AND PROPERLY AFFIRMED THE JURY'S FINDING IN THE INSTANT CASE THAT THE EVIDENCE SHOWED SUFFICIENT STATUTORY AGGRAVATING CIRCUMSTANCES UNDER GA. CODE ANN. §§ 27-2534.1(b)(2) AND (b)(7) TO WARRANT THE IMPOSITION OF THE DEATH SENTENCE AGAINST THE PETITIONER.

Petitioner initially contends that the Supreme Court of Georgia has allegedly adopted such a broad interpretation of Ga. Code Ann. § 27-2534 (b)(7)[2/] that the affirmance of the Petitioner's death sentence based in part on the jury's finding of that aggravating circumstance violates the Eighth and Fourteenth Amendments to the Constitution of the United States. Respondent submits that this contention is erroneous and the Georgia Supreme Court properly concluded that the Petitioner's sentence was authorized under the aforesaid code section.

As noted in Part II of this brief, two statutory aggravating circumstances were found to exist by the jury which had tried the Petitioner's case. These were: (1) "The offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant," and (2) "The offense of murder was committed while

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2/ Georgia's seventh aggravating circumstance authorizes the jury to impose the death penalty when it finds beyond a reasonable doubt that: "The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

the offender was engaged in the commission of an additional felony, to wit: armed robbery of Dennis Beatenbaugh." (T. 309-310; R. 12). [Petitioner's attack upon the second stated aggravating circumstance will be addressed in the latter portion of this brief.] Petitioner's death sentence was affirmed by the Georgia Supreme Court based upon both of the jury findings. Baker v. State, 243 Ga. 710, 257 S.E.2d 192 (May 31, 1979).

In Gregg v. Georgia, 428 U.S. 153, 201, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the plurality opinion addressed the issue of whether Ga. Code Ann. § 27-2534.1(b)(7) was overly broad and vague. The plurality acknowledged that an open-ended construction need not be applied by the Georgia Supreme Court to the language of the statute, and thus, the constitutional validity of that code section was upheld.

The Georgia Supreme Court has recognized its obligation under the Georgia statutory provisions which mandate that it thoroughly review death sentences,[3/] and specifically with regard to Ga. Code Ann. § 27-2534.1(b)(7), it has stated that it has no intention of permitting that code section to become a "catchall" for cases simply because no other statutory aggravating circumstance has been raised by the evidence. Harris v. State, 237 Ga. 718, 730, 230 S.E.2d 1 (1976), cert. den. 431 U.S. 933 (1977), rehearing den. 434 U.S.

3/ Under Ga. Code Ann. § 27-2537(c), the court must review all death penalty cases to determine:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

882 (1977), modified as to sentence only, Harris v. Hopper, 243 Ga. 244, ___S.E.2d ___ (1979). The court further stated in Harris its intention to restrict its approval of death sentences supported by Code § 27-2534.1(b)(7) to those cases which lie not on the periphery of the statutory boundaries, but to only approve those sentences which are so outrageous and vile so as to lie at the core of the statutory intent. As the prior statement of facts amply demonstrates, the facts surrounding the murder of Dennis Beatenbo fall within the purview of Code § 27-2534.1(b)(7).

Petitioner cites this Court to Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (Feb. 27, 1979), cert. granted, ___U.S.___ (Oct. 9, 1979), and argues that similar questions of proper appellate review procedures are present in that case and in the case sub judice. Certiorari was granted in Godfrey specifically on the issue of whether in affirming the imposition of the death penalty in that case, the Georgia Supreme Court had adopted an overly broad and vague construction of Ga. Code Ann. § 27-2534.1(b)(7) so as to violate the Eighth and Fourteenth Amendments to the United States Constitution. By this Court's own wording of the issue, the question in Godfrey to be examined refers to the imposition of the death penalty in that case. There are a number of distinguishin features between Godfrey and the instant case.

Initially it should be noted that in Godfrey, Code § 27-2534.1(b)(was the only aggravating circumstance found by the jury. Godfrey supra at p. 310. In the instant case the jury found a second aggravating circumstance in addition to (b)(7). This second aggravatin circumstance, of course, was that the murder had been committed during the course of the armed robbery of the victim. The Georgia Supreme Court has consistently interpreted armed robbery as a capital

felony for the purpose of constituting a statutory aggravating circumstance under Ga. Code Ann. § 27-2534.1(b)(2). See, Peek v. State, 239 Ga. 422, 431-432, 238 S.E.2d 12 (1977), cert. den., ___U.S.___, 99 S.Ct. 218 (1978); Bowden v. State, 239 Ga. 821, 829, 238 S.E.2d 905 (1977), cert. den., 435 U.S. 937 (1978).

Additionally, unlike the situation in Godfrey, the jury found that the murder in the instant case, "was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant." (T. 309). In Godfrey, the jury in its written findings, stated as the aggravating circumstance supporting the death penalty, only that "the offense of murder was outrageously or wantonly vile, horrible and inhuman." Godfrey, supra, at p. 310. Thus, a clear distinction appears between the facts in Godfrey and this case in the area of aggravating circumstances.

The Petitioner's extended argument that the Georgia Supreme Court attributed an erroneous finding to the jury (an alleged finding of aggravated battery) does not take into consideration the court's use of the disjunctive phraseology in its opinion. Specifically, the Georgia Supreme Court stated,

> "In addition, the jury found that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Code Ann. § 27-2534.1(b)(7).
>
> We conclude that the evidence supports the jury's finding of these statutory aggravating circumstances." Baker, supra at p. 712.

By citing the above, the Georgia Supreme Court simply held that the jury's finding fell within the above language. The jury specifically did find two of the three listed illustrations of the "in that" clause under (b)(7). These were that the murder involved torture of the victim or depravity of mind on the part of the defendant. The listing of the third aggravating illustration of the "in that" clause by the Georgia Supreme Court in no way effects the jury's finding that the other two aggravating illustrations existed, and at most, the reference to aggravated battery should be considered only harmless error.

The Petitioner's reliance on Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948), for the proposition that the listing of the aggravated battery in the Georgia opinion demands a reversal, is inapposite, because Cole involved an entirely different factual situation from the present case. In Cole, a defendant had been charged by information with the violation of a specific code section, and likewise, was convicted of violating that same code section. On appeal the Arkansas Supreme Court affirmed the conviction as though the defendant had been tried and convicted for violating a completely different code section. This Court found such an affirmance by the Arkansas Supreme Court had violated the defendant's right to due process. However, in the case sub judice the Petitioner's death sentence is supported by the jury's finding of two separate aggravating circumstances, [Code §§27-2534.1 (b)(7) and (b)(2)], either of which alone is sufficient to support the challenged death penalty. Furthermore, as previously noted, the jury found two of the three illustrations listed in the "in that" clause of Code § 27-2534.1 (b)(7). Thus, the Georgia Supreme Court's reference to aggravated battery in its opinion simply has no bearing on whether the Petitioner's

death penalty is authorized when ample evidence supports the finding of all other aggravating circumstances.

Specifically with regard to the jury's finding of aggravating circumstances under Code § 27-2534.1(b)(7) the Petitioner contends the evidence was insufficient to show any torture of the victim, and thus the Georgia Supreme Court's affirmance of that portion of the aggravating circumstances authorizing the death penalty allegedly was erroneous. Contrary to the Petitioner's assertions, an examination of the transcript reveals sufficient evidence to support the jury's finding that the victim suffered from torture.

In the Petitioner's confession to the police, he related how he had smashed a whiskey bottle over the head of Dennis Beatenbo. He further admitted, "I reached in my belt with my right hand and pulled out my pistol and the guy was still lying on his back. I pointed the gun at the man and I pulled the trigger. I don't know how many times I shot him, but I could hear him moaning and trying to say something . . . ." (T. 151, Emphasis added).

Gwinnett County Medical Examiner, Doctor Donald Dove, performed the autopsy on Dennis Beatenbo. He testified that the victim had received a crushing blow to his face which had broken his nose and had extensively damaged the tissue around both eyes. There was also a bruise on the victim's forearm which was classified as a defensive type wound. (T. 102).

Furthermore, Doctor Dove testified that the victim suffered three separate chest wounds from a gun which had been placed against his body and fired. (T. 97). Although the cause of death was a bullet which passed through the victim's heart, Doctor Dove could not speculate in which order the chest wounds had been inflicted. (T. 98). Thus, the jury could have found that Dennis Beatenbo had been alive until the last shot was fired.

An additional fourth shot was fired into the victim's scrotum area; however, Doctor Dove theorized that this wound was implemented after the victim's death. (T. 98).

In summary, from viewing all of the evidence, it is apparent that a reasonable, rational juror could have concluded that Dennis Beatenbo had been struck violently across the face and shot at least twice in the chest before a third shot killed him. A reasonable juror could also have concluded that this attack resulted in agonizing pain to the victim before he died.

In light of this evidence showing that Dennis Beatenbo was severely struck in the head and shot four times by the Petitioner, this Court should reject the Petitioner's argument that there was no evidence of torture. Jackson v. Virginia, __U.S.__, 99 S.Ct. 2781 (June 28, 1979).

Likewise, Petitioner's death penalty is also authorized by the jury's finding that the murder was vile, horrible and inhuman in that it involved depravity of mind on the part of the defendant. The aforesaid facts surrounding the murder show a cold-blooded, brutal attack upon the victim. The jury's finding that the Petitioner exhibited depravity of mind can best be supported simply by a review of those facts, and by referring to a statement made by the Petitioner, "Danny why did you kill him?", the Petitioner answered, "Just to watch him die." (T. 168).

Although admittedly, the Georgia Supreme Court has stated that a statutory aggravating circumstance which consisted solely of a finding that the murder involved depravity of mind, would most likely not survive a constitutional challenge based on Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.E.2d 346 (1972), because of excessive broadness; however, the context in which that observation

was made is distinguhisable from the present case. The Georgia Supreme Court expressed that opinion in the recent case of Holton v. State, 243 Ga. 312, 318, __S.E.2d__ (March 6, 1979). In that case the jury had fixed the death sentence on two counts of murder based upon its finding that the defendant had exhibited depravity of mind. The jury's finding completely omitted all references to the words "outrageously or wantonly vile, horrible or inhuman." Respondent submits that if the phrase depravity of mind is supported by the jury's finding that the murder was outrageously or wantonly vile, horrible or inhuman, such would be sufficient to pass constitutional examination, especially when the jury finding is later examined upon review by the Georgia Supreme Court, and the facts of the murder are found to be sufficiently outrageous so as to be considered as lying at the "core" of the statute's intent. In any case, the Petitioner's death sentence in this case was not supported solely by the jury's finding that he had exhibited depravity of mind.

Finally, there was overwhelming evidence that the attack upon the victim had been motivated by an intent to "roll" him, and that twenty-two dollars and a watch were taken from the victim's body immediately before the murder. The Georgia Supreme Court correctly held in its review that this evidence sufficiently supported the jury's finding of aggravating circumstances under Ga. Code Ann. § 27-2534.1(b)(2).

Thus, since the court below fully considered and correctly decided that the Petitioner's death penalty was authorized by all of the jury's findings of statutory aggravating circumstances, the Petitioner's contentions I, II and III under his reasons for granting the writ, in support of his application for a writ of certiorari, should be found to be without merit.

B. THE OFFENSE OF ARMED ROBBERY MAY BE CONSIDERED AS "ANOTHER CAPITAL FELONY" UNDER GA. CODE ANN. § 27-2534.1(b)(2), AND THUS MAY SERVE AS AN AGGRAVATING CIRCUMSTANCE JUSTIFYING THE IMPOSITION OF THE DEATH PENALTY.

The Petitioner's final argument in support of his petition contends that since the death penalty may no longer be imposed for the offense of armed robbery in Georgia [Collins v. State, 239 Ga. 400, 404, 236 S.E.2d 759 (1977)], it is no longer a capital felony, and therefore, cannot be utilized under Ga. Code Ann. § 27-2435.1(b)(2) as a statutory aggravating circumstance supporting the imposition of the death penalty.

In Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977), cert. den., __U.S.__, 99 S.Ct. 218 (1978), the Georgia Supreme Court specifically addressed the above issue which is raised by the Petitioner in the instant case. This presented a question of statutory interpretation to the court, and it concluded as follows:

> "We construe 'capital felony' as that term is used in § 27-2534.1(b)(2) in a generic sense to include those felonies which were capital crimes in Georgia at the time this section of our death penalty statute was enacted." Id., at p. 432.

The Georgia Supreme Court has continued to consistently hold that armed robbery is a capital felony for the purpose of finding aggravating circumstances. See, Bowden v. State, 239 Ga. 821, 829, 238 S.E.2d 905 (1977), cert. den., 435 U.S. 937 (1978); Davis v. State, 241 Ga. 376, 384, 247 S.E.2d 45 (1978), cert. den., 429 U.S. 122 (1978)

Armed robbery was an aggravating circumstance supporting the death penalty in Gregg v. Georgia, 428 U.S. 153, 161, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), this Court recognized without disapproval that under Georgia law armed robbery is considered a capital felony for the purpose of applying the aggravating circumstances provision of the Georgia Code. Id., 433 U.S. at p. 599, n. 15.

In holding that armed robbery may be considered a capital felony for the purposes of Code § 27-2534.1(b)(2), the Georgia Supreme Court has correctly applied the basic premise that the objective of a court in construing statutory construction is to ascertain the intent of the legislature and give effect to that legislative will. Philbrook v. Glodgett, 421 U.S. 707, 713, 95 S.Ct. 1893, 44 L.Ed.2d 525 (1975).

Thus, for these reasons the Petitioner's contentions, under section IV of reasons in support of his application for granting the writ of certiorari, should be found to be unmeritorious.

CONCLUSION

For all of the above and foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari in the present case be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing a copy of the same in the United States mail with adequate postage attached thereon and addressed to:

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This 6th day of December, 1979.

JOHN C. WALDEN